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IN THE

Supreme Court of the United States

OCTOBER TERM — 1955

No. 349

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

WILLIAM E. HALLADA, JR.,
Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent does not dispute the fact that a determination by this Court of the questions presented for review is important to the proper administration of justice under the Safety Appliance Act and the Federal Employers Liability Act. Respondent's brief merely argues that the decision below is correct and in this respect he begs the question by

citing the opinion below as evidence of its alleged correctness. While the petition herein demonstrates that the decision below was based upon an erroneous determination of the three questions presented for review, the following points raised by respondent deserve additional comment.

1. Failure to Align Draw-bars Is a Defense

The evidence in this case establishes as a matter of law that a proper attempt to couple the two cars on the curved track, shown in Defendant's Exhibits F and G, required an alignment of the draw-bars in order to compensate for the *functional* misalignment caused by the curved track. Respondent's only attempt to refute this fact is based upon an abridged version of witness Van Steinberg's testimony. The full quotation of his testimony follows: (R. 495-496)

> "Q. And is the track at the location of the frog, between the switch and the frog, is that a straight track or a curved track?
>
> A. Well, there is a certain amount of curvature in the track there (indicating).
>
> Mr. Rerat: Not as much as you are indicating there out from the switch to the frog.
>
> Q. (Mr. Westphal): I will ask you to assume, Mr. Van Steinberg, that the curvature is as shown here on defendant's Exhibit F on the track which swings to the left from the switch as you see it in that picture (indicating)?
>
> A. There is a curve there. That is what I said.
>
> Q. And what effect does the presence of that curve have upon the alignment of the couplers or draw-bars?
>
> A. Well, when your car is on the curve the east draw-bar is to the north of south this way (indicating), and the west draw-bar would be this way (indicating). It

isn't a great deal but it is off. It is not perfectly on center.

Q. And what kind of an alignment would you make to the draw-bars or either or both of those draw-bars on either or both of those cars in order to make that coupling operation?

A. I would pull this coupler to the north and this to the south (indicating) with both knuckles open.

Q. And in that position would they be properly aligned for a coupling on that track?

A. Yes, sir.

Q. And is that the practice and the custom of making couplings between railroad cars?

A. Yes. You can tell by looking when you are on the job whether it is in alignment or not."

This *uncontradicted* testimony, based upon photographs of the track itself, establishes that the functional misalignment was of such a degree that the coupling could not have been made upon impact without an adjustment of the draw-bars.

The failure to align the couplers which occurred in this case was not a mechanical failure but was merely a human failure and whether it was the duty of respondent or of someone else to align the couplers was neither in issue nor litigated at the trial. Respondent's quotation (Resp. Brief, p. 2) of witness Hiney's gratuitous statement that he employs the trial and error method of aligning mechanically perfect couplers does not take this case out of the principle of the *Affolder* decision which requires that the couplers be properly set, adjusted and aligned before a single failure to couple can be held to be a violation of the Safety Appliance Act.

2. Trial Court's Erroneous Instructions

Respondent misconceives the petitioner's second question presented for review which is based upon the finding by the Minnesota Supreme Court that the charge to the jury did not distinguish and separate the two causes of action as clearly as should have been done under the rule of the *O'Donnell Case* and upon that Court's erroneous conclusion that this error in the charge did not require a new trial. Reference was made in the petition herein to the refusal to submit petitioner's requested special interrogatories merely to illustrate that petitioner did not lay back and invite the error which was found by the Minnesota Supreme Court. A proper charge to the jury within the principle of the decision in the *O'Donnell Case* is just as important in order to distinguish the different effects of contributory negligence as it is to distinguish a negligence count from a non-negligence count, and for this reason the Writ prayed for should be granted.

3. Monstrous Excess in Verdict Required a New Trial

Admittedly the verdict was excessive by $65,154.81. Petitioner contends that this monstrous excess required a new trial under the rule in F.E.L.A. cases announced in the *Moquin Case*. While the improper influence of passion and prejudice on the part of the jury appears upon the face of things, petitioner fortified its argument by pointing to several obvious sources of that passion and prejudice, viz., the squeezing of the stump of respondent's arm and the hysterical weeping of respondent's pregnant wife upon the witness stand. Respondent in his brief has laid claim to the "ability of a trial man" as the source of the excess. (It might here be observed

that some of the "abilities" of respondent's "trial man" were cited to the trial court and Minnesota Supreme Court as a basis for a new trial on the grounds of misconduct of counsel, see Assignments of Error Nos. 14b, 14c, 14d, and 14e, R. 669-672.)

But is such a search for the source of the passion and prejudice necessary in order to establish the legal action required by the reviewing court? The two avenues of judicial approach can best be illustrated by comparing the decision below with the recent decision in *Beckstad v. Shelly Oil Co.*, (U.S.D.C. Minn. 1955) 131 F. Supp. 940. In that case a verdict of $175,956 was awarded a 20-year-old plaintiff for first, second and third degree burns resulting in a 50% permanent disability to one leg and 25-30% to the other. The district judge in the *Beckstad Case,* citing the decision below as authority, likewise came to the conclusion that the verdict was grossly excessive. But there the similarity between the two decisions stops. In granting an unconditional new trial in the *Beckstad Case* the court concluded that such monstrous excess could not be cured by remittitur but that the entire verdict must be vititated and a new trial ordered. The Court stated:

> "It is apparent to the Court that the jury here committed grave error in subscribing, even in part, to the mathematical computations proposed for use in determining damages without giving reasoned thought to either the incidents composing the elements of damages in each category or the overall reasonableness of the total damages awarded. The verdict must have been the result of pity and sympathy for the plaintiff. Nothing else explains its inordinate size.
>
> "A new trial must be granted and I have been in a quandary as to whether I have the authority to make the

granting thereof conditional upon a remittitur of the excessive portion of the verdict. After reading the cases I am satisfied that the entire verdict is vitiated and that it cannot be cured by a remittitur. Ford Motor Co. v. Mahone, 4 Cir. 1953, 205 F. 2d 267; Brabham v. State of Mississippi, 5 Cir. 1938, 96 F. 2d 210; National Surety Co. v. Jean, 6 Cir. 1932, 61 F. 2d 197; Minneapolis, St. P. & S. S. M. Ry. Co. v. Moquin, 1931, 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243.

"A new trial is ordered."

Irrespective of whether passion and prejudice must be traced to a source or whether it is inherent in the very size of the excess, it is petitioner's contention that the monstrous excessiveness of $65,154.81 required an unconditional new trial of the case at bar.

CONCLUSION

The Writ prayed for should issue to review all three of the questions presented.

Respectfully submitted,

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